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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-415

WESLEY WARD,

Appellant,

vs.

STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

The State of Illinois accepts appellant's statements in those portions of his brief labeled "Opinions Below", "Jurisdiction", "Questions Presented", "Constitutional Provisions and Statutes Involved", and "Statement [of the Case]".

SUMMARY OF ARGUMENT

1. The Illinois legislature and courts have consistently written and modified obscenity law to accommodate the evolving constitutional requirements formulated by this

Court in its many obscenity decisions. This practice was continued regarding the rules handed down in *Miller* v. *California,* 413 U.S. 15 (1973); the Supreme Court of Illinois specifically reprinted these rules in two post-*Miller* decisions and construed Ill. Rev. Stat., Ch. 38, §11-20 to incorporate parts (a) and (b) of the *Miller* standards along with the examples of obscenity in part (b).

2. Illinois' method of construing its Obscenity Statute to meet the stiffer *Miller* standards (not part (c) which relaxes the test of social value) is an authoritative construction and is essentially the same as the method used by this Court to save a less specific federal statute in *Hamling* v. *United States,* 418 U.S. 87 (1974). It is clearer than the methods used by other state and federal reviewing courts to construe and save their obscenity statutes. There are thus different valid ways to construe state statutes into conformity with *Miller,* without literally inserting *Miller's* examples into the statutes.

3. Even if the Supreme Court of Illinois had not clearly or sufficiently adopted parts (a) and (b) of *Miller's* standards with the examples of obscenity, nevertheless there exist substantive decisions by the Illinois reviewing courts defining obscenity which, when added to the already well-defined statute, provide enough specificity and certainty to render the Illinois statute constitutional.

4. Appellant's conviction under an obscenity statute that was re-constructed after he committed his offense does not offend due process since the materials he sold were obscene under both pre-*Miller* and post-*Miller* standards. He had adequate notice well before 1972 that the magazines he sold contained pictures which portrayed obscene conduct according to Illinois law.

ARGUMENT

I.

THE SUPREME COURT OF ILLINOIS DID CONSTRUE THE OBSCENITY STATUTE SO AS TO PROPERLY INCORPORATE INTO IT THIS COURT'S MILLER STANDARD, PARTS (A) & (B), INCLUDING THE SPECIFIC EXAMPLES OF OBSCENITY.

A. Historical Background.

The history of Illinois' obscenity law since 1960 shows a consistent desire on the part of the State, both legislatively and judicially, to adopt whatever rule has been approved by this Court. In the new Illinois Criminal Code of 1961, a different definition of obscenity was adopted based on this Court's decision in *Roth* v. *United States,* 354 U.S. 476 (1957). See, *People* v. *Biocic,* 224 N.E. 572, 575 (Ill. App. Ct., 1st Dist. 1967). Drafters of the Criminal Code said in their "Committee Comments" following the Obscenity Statute, Ill. Rev. Stat., Ch. 38, §11-20, that they essentially adopted the American Law Institute Model Penal Code draft on this subject. The "Comments" go on to say:

> "The basic position taken by the Committee is a realistic one in that it recognizes that today society often condones literature, movies, and other art which may incidentally provide erotic stimulation. And, in agreement with the drafters of the Model Penal Code, the Committee aimed primarily at the commercial dissemination of obscenity. (See generally Model Penal Code § 207.10, comment at 5-92, Tent. Draft No. 6, 1957).

Section 11-20 is similar to former Illinois legislation on this subject, although some changes have been made which should be noted. (See Ill.Rev.Stat. 1959, ch. 38, §§ 468-472a.) First of all, the definition of obscenity in subsection (b) is slightly different from that previously provided in the case law interpreting Illinois statutes. Under then existing law a thing was obscene if 'Its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh . . . artistic or other merits . . .' (*American Civil Liberties Union* v. *City of Chicago,* 3 Ill.2d 334, 121 N.E. 2d 585 (1954), *appeal dismissed,* 348 U.S. 979, 75 S. Ct. 572, 99 L.Ed. 839 (1955).) Under subsection (b) material must appeal to sexual interest (or interest in nudity or excretion), but it must also go beyond the customary limits of candor in the description of such things. This is perhaps a small difference, but the older definition may incorporate certain art or advertising matter which is generally accepted today, yet the dominant effect of which is to 'arouse sexual desires.' (*id.*)

A second significant departure from former law is the inclusion of a list of different types of evidence which are admissible as bearing on the question of whether the material is obscene (subsection (c)). This is unusual in a statute defining substantive offenses, but was deemed necessary in this area because of the elusive nature of the standards which determine obscenity. It is not necessary to conviction, of course, to introduce any or all of the types of evidence listed in subsection (c); nor does it provide an exclusive list of the types of evidence which may be admissible as bearing on the question of obscenity. These provisions are only listed to serve as a guide and to deter a trial court from holding any one of the types to be inadmissible in a proper case. . . .

A third important change is provided by subsection (f). The two affirmative defenses listed there have the effect of reserving criminal punishment for those situations in which the obscenity is disseminated to strangers for gain. Thus, private noncommercial dissemination between adults is no longer an offense. The Committee felt that such activity, although it might indicate impaired personal morals, or mental health, on the part of the parties involved, does not call for criminal sanctions by the State. . . .

The section is probably free from constitutional deficiencies, since a substantially similar prohibition against obscenity has been upheld by the United States Supreme Court against the contention that it violated the First and Fourteenth Amendments which insure freedom of communication. (See *Roth* v. *United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).) This in itself is an improvement over the former legislation. . . ." S.H.A. (1964), Ch. 38, §11-20.

When this Court added the utterly-without-redeeming-social-value test to the requirements for a constitutional obscenity law [*Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966)], the Supreme Court of Illinois construed the Obscenity Statute discussed above to include the new test. *People* v. *Romaine,* 38 Ill. 2d 325, 231 N.E. 2d 413 (1967); *City of Blue Island* v. *DeVilbiss,* 41 Ill. 2d 135, 242 N.E. 2d 761, 764 (1969), as explained in *People* v. *Burkhardt,* 297 N.E. 2d 694, 697 (Ill. App. Ct., 1st Dist. 1973). Also the Illinois General Assembly amended Ch. 38, §11-20 following *Memoirs* to add the second sentence of subsection (c), "Interpretation of Evidence", concerning commercial exploitation and the conclusion that the material in question is utterly without redeeming social importance. S.H.A. (1972 Suppl.), Ch. 38, §11-20. Following *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964), the Illinois reviewing courts under-

took to make an independent constitutional judgment on all materials which provided the basis for obscenity convictions. *City of Blue Island* v. *DeVilbiss,* 242 N.E. 2d at 763.

As a result of its faithful conformity to this Court's decisions on obscenity, Illinois now finds after *Miller* that it has a statute which is stricter in one respect from the prosecution viewpoint than the latest federal standard—the statute includes the utterly-without-redeeming-social-value test. *People* v. *Ridens* II, 59 Ill. 2d 362, 321 N.E. 2d 264 (1974).

B. The Statute's Most Recent Construction.

The major refinement of obscenity law decreed by *Miller* v. *California,* 413 U.S. 15 (1973), was its requirement that obscenity statutes be revised or construed to more specifically define the sexual portrayals prohibited therein. The *Miller* Opinion stressed several times that the needed specificity could be added to obscenity statutes through judicial construction by state courts of last resort. 413 U.S. at pp. 25, 26, 28 and Note 6. Judicial construction of obscenity statutes to bring them into line with *Miller* was accomplished or approved by this Court in *Hamling* v. *U.S.,* 418 U.S. 87 (1974), and *Miller* v. *California* II, 418 U.S. 915 (the second appeal of the *Miller* case, after the California courts had construed and upheld their statute following this Court's remand in *Miller* I).

Accordingly, the Illinois Supreme Court has twice construed Section 11-20 of the Criminal Code of 1961 as amended, so as to guarantee its conformity with the *Miller* standards of what constitutes obscenity.

In *People* v. *Ridens* II, 59 Ill. 2d 362, 321 N.E.2d 264 (1974) the Court sought to read the *Miller* formulae into the statute. See *People* v. *Watson,* 26 Ill. App. 3d 1081, 325 N.E.2d 629, 631 (1975) ("In Ridens . . . the . . . Court . . . stated that the Illinois statute substantially incorporates or is, at least, consistent with the requirements established in Miller"). In their lengthy *Ridens* II Opinion, the Illinois Supreme Court quoted the operative passages of *Miller,* pp. 24-26 in their entirety including the examples of obscenity, and then said: "It suffices to, and we now construe §11-20 of the Criminal Code and the Moline obscenity ordinance to incorporate parts (a) and (b) of the *Miller* standards." 59 Ill. 2d at 371.

The only difficulty with *Ridens* II is that the holding of the opinion fails to specifically refer back to and give specific incorporation to that part of Miller which states:

> "It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

Mr. Justice Davis, writing in dissent, noted this omission.

However, when the defendants in *Ridens* II again petitioned this Court for Certiorari alleging Illinois' noncompliance with *Miller,* their petition was denied even though four members of this Court voted to grant Certiorari and reverse the decision of the Illinois Supreme Court. 421 U.S. 993 (May 27, 1975). When added to the Illinois Supreme

Court's expressed intention of incorporating the *Miller* standards in *Ridens* II, this denial of certiorari seemed to indicate that the construction of ch. 38, §11-20 by the Illinois Court was complete and satisfied *Miller*.

Whatever doubt may have existed regarding the incorporation of *Miller* by Illinois was resolved ten months after *Ridens* II. In *People* v. *Gould,* 60 Ill. 2d 159, 324 N.E.2d 412 (1975) the Court analyzed its position *vis-a-vis Miller*:

> "In *Miller* v. *California,* the Supreme Court in describing the constitutional guidelines for the regulation of obscene material said . . .;
>
> '• • • State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulations to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> The basic guidelines for the trial of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. • • •
>
> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of

> what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.'

At the direction of the Supreme Court of the United States, in *People* v. *Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (hereafter Ridens II), we consider further, in light of *Miller,* our earlier judgment in *People* v. *Ridens,* 51 Ill.2d 410, 282 N.E.2d 691 (Ridens I). We held in Ridens II that our obscenity statute (Ill. Rev. Stat. 1969, ch. 38, par. 11-20) remained constitutional, we construed our statute to incorporate parts of guidelines (a) and (b) of the *Miller* standards (*which are set out in the above quotation from Miller*) and stated that under our statute the third question or guideline which must be considered in determining whether the matter or work is obscene is whether it is "utterly without redeeming social value.' We explained that the more restrictive guideline (c), or part (c), of the *Miller* standard, *i.e.,* whether 'the work, taken as a whole, lacks serious literary, artistic, political, or scientific value' cannot be used. See Ridens II."

People v. *Gould,* 324 N.E.2d at 414-15, (emphasis added) (citations omitted).

The Illinois Supreme Court's reprinting of all the operative *Miller* passages and reincorporation of the guidelines "which are set out in the above quotation" clearly demonstrate that this Court's specific examples of obscenity were read into the Illinois obscenity statute in *Ridens II* and *Gould.* Thus, the court in *Eagle Books* v. *Reinhard,* 418 F. Supp. 345 (N.D. Ill. 1976), appeal pending, 45 L.W. 3192,

erred when it interpreted the *Ridens II* and *Gould* opinions as not adopting the *Miller* examples of obscenity as their own, in order to meet *Miller's* specificity requirement. The 3-Judge District Court, being too technical in its approach to appellate construction, ignored the plain intent of the Illinois justices in *Ridens II* and *Gould*.

II.

THE SUPREME COURT OF ILLINOIS AUTHORITATIVELY CONSTRUED THE OBSCENITY STATUTE USING A METHOD SIMILAR TO THE ONE EMPLOYED BY THIS COURT AND OTHER REVIEWING COURTS.

The same general technique employed by the Supreme Court of Illinois to incorporate the *Miller* examples of prohibited obscenity into ch. 38, §11-20 was used by this Court to save a federal obscenity statute in *Hamling* v. *United States*, 418 U.S. 87 (1974). The *Hamling* decision involved a statute which, like most federal obscenity laws, is much more general and undefined than the obscenity laws of many states, including Illinois.[1] No statutory definitions of the terms "obscene, lewd", etc., were supplied by Congress. In the course of the *Hamling* decision, this Court noted that 18 U.S.C. 1461 had frequently been sustained

[1] 18 U.S.C. 1461 reads in pertinent part:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device or substance; and—

* * *

Every written or printed card, letter . . . of any kind giving information, directly or indirectly, where or how or from whom, of by what means any of such mentioned matters, articles or things may be obtained or made. . . . Is declared to be nonmailable matter and shall not be delivered from any post office or by any letter carrier."

against constitutional attacks and quoted approvingly from *Roth* v. *United States*, 354 U.S. at 491-92, saying that lack of precision is not itself offensive to the requirements of due process and that the statutory language must simply convey sufficient warning as to the proscribed conduct when measured by common understanding and practices. The *Hamling* Opinion then quoted Justice Harlan's decision in *Manual Enterprises* v. *Day*, 370 U.S. 478 (1962) interpreting the federal statute as always having been taken "as aimed at obnoxiously debasing portrayals of sex", and it referred to this as an authoritative construction of the statute consistent with *Miller*. 418 U.S. at 113. However, most likely believing that the older authoritative construction did not come up to *Miller's* concept of specificity, the *Hamling* decision then construed 18 U.S.C. 1461 to be limited to the kind of conduct listed in the *Miller* examples of obscenity. Nevertheless, the Opinion did not in so many words repeat and adopt *Miller's* list of obscene types of materials. It simply stated:

> "As noted above, we indicated in *U.S.* v. *12 200-ft. Reels of Film*, supra, 413 U.S. at 130 n.7, 93 S.Ct. at 2670, that we were prepared to construe the generic terms in 18 U.S.C. 1462 to be limited to the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California*.' We now so construe the companion provision in 18 U.S.C. 1461, the substantive statute under which this prosecution was brought. As so construed, we do not believe that petitioner's attack on the statute as unconstitutionally vague can be sustained." 418 U.S. at 115.

This is essentially what the Illinois Supreme Court said against a similar historical backdrop of statutory construction (see Arg. III, infra), in *Ridens II* and *Gould, supra,*

when it reprinted the governing portions of *Miller*, including the examples, and then construed Ch. 38, §11-20 to include those requirements.

Two other post-*Miller* federal obscenity decisions were even less technical than the Supreme Court of Illinois in construing statutes to conform with the *Miller* requirements. In *United States* v. *Thevis*, 484 F. 2d 1149, 1155 (5th Cir. 1973), cert. denied, 418 U.S. 932 (1974), the Court heard a challenge to 18 U.S.C. 1462[2] for lacking specificity and noted that this Court was "prepared to construe" its terms as regulating only the obscene material listed in *Miller*. The Court of Appeals concluded:

> "We believe that this answers the question and that the *definition of Miller is a gloss properly added to* §1462. The effect is to substitute the *Miller* definition of 'obscene' for the *Memoir's* definition. On this basis we proceed to an examination of the materials which underlie the indictment." 484 F. 2d at 1155. (Emphasis added).

Finding that 6 magazines contained pornographic pictures and were utterly without redeeming social value, the court affirmed the convictions for the pre-*Miller* transportation of these magazines.

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2 18 U.S.C. 1462 reads:

> "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—(a) any obscene, lewd, lascivious, or filthy books, pamphlet, picture, motion-picture, film, paper, letter, writing, print, or other matter of indecent character; . . . Shall be fined no more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

If the *Miller* specificity requirements are properly considered a constitutionally necessary gloss on existing federal obscenity statutes, the same concept would logically apply to state statutes unless state legislatures or courts have ruled to the contrary. Such an automatic application is logical because, of course, this Court is the ultimate authority on what the First Amendment requires, and its interpretations are binding on the States. Formal re-printing of this Court's *Miller* requirements by state high courts would thus seem to be unnecessary, given the stature and binding character of the *Miller* Opinion.

In *United States* v. *Gower*, 503 F. 2d 189 (D.C. Cir. 1974), the defendant had been convicted of pre-*Miller* possession and sale of obscene photographs and films in violation of 22 D.C. Code §2001(a)(1), a statute which did not define the words "obscene", "indecent", or "filthy".[3] Addressing

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3 22 D.C. Code §2001(a)(1) provided:

> "It shall be unlawful in the District of Columbia for a person knowingly—
>
> (A) to sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute, or provide any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;
>
> (B) to present, direct, act in, or otherwise participate in the preparation or presentation of, any obscene, indecent, or filthy play, dance, motion picture, or other performance;
>
> (C) to pose for, model for, print, record, compose, edit, write, publish, or otherwise participate in preparing for publication, exhibition, or sale, any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;
>
> (D) to sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute or provide any article, thing,

(footnote continued on following page)

the issue of the statute's vagueness, the Court of Appeals said:

> "The language of the statute nowhere specifies the type of conduct to which *Miller* refers. The question therefore arises whether it may be so limited by the authoritative construction of the District of Columbia Court of Appeals. At present, we have no such authoritative construction. Federal courts are to decide questions of state law not yet decided by the highest state court. *In the present case, however, we see no reason to undertake a definite interpretation of § 2001 (a)(1),* which may have a short life in the light of subsequent D.C.C.A. opinions. It suffices for us to say that we are convinced that the statute will receive a limiting construction that will maintain its application to the facts of this case.
>
> The materials in this case were '[p]atently offensive representations . . . of ultimate sexual acts' and 'patently offensive representations . . . of masturbation.' See *Miller,* 413 U.S. at 25, 93 S. Ct. at 2615." (footnotes omitted, emphasis added). 503 F. 2d at 191.

The Court went on to say that the case, tried without a jury (as was the instant case), would undoubtedly have reached the same result if it had been tried after *Miller* and according to its requirements. The convictions were affirmed on all counts but one. This Opinion takes a much

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or device which is intended for or represented as being for indecent or immoral use;

(E) to create, buy, procure, or possess any matter described in the preceding subparagraphs of this paragraph with intent to disseminate such matter in violation of this subsection;

(F) to advertise or otherwise promote the sale of any matter described in the preceding subparagraphs of this paragraph; or

(G) to advertise or otherwise promote the sale of material represented or held out by such person to be obscene."

more casual aproach to construction of an obscenity statute to satisfy *Miller* than did the *Ridens II* and *Gould* decisions of the Illinois Supreme Court.

State reviewing courts have also re-construed their obscenity statutes without clearly adopting limiting examples of conduct proscribed by law from *Miller* or any other sources. The Oklahoma Supreme Court in *State ex rel. Field* v. *Hess,* 540 P. 2d 1165 (Okla. Sup. Ct., 1975) affirmed in modified form an injunction against an "adult book store" to prevent the sale of certain obscene materials, notwithstanding its owner's claim that the Oklahoma obscenity statutes were unconstitutional. The court summarized the basic *Miller* requirements without reprinting the examples of obscenity and then held that "The Oklahoma Obscenity Statutes here considered, 21 O.S. 1971 §§1021, 1040.51, 1040.12, are constitutional, even though the constitutional standards are not literally incorporated therein, for those standards are to be implied whenever the statutes are applied." 540 P. 2d at 1169.[4]

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[4] The pertinent Oklahoma statutes read in part:

21 O.S. 1971 §1021—

"Every person who wilfully either:

• • •

(3) • • • sells, distributes, keeps for sale, or exhibits any obscene or indecent writing paper, book, picture, photograph, figure or form of any description;"

• • •

21 O.S. 1971 §1040.51—

"Any person who knowingly buys, sells, barters, traffics in, . . . any pictures, moving picture, series of pictures, drawing, diagram or photograph of any person or animal or caricature thereof in an act or acts of sexual intercourse of unnatural copulation shall be deemed guilty of a felony."

Section 1040.12 defined "obscene" as "that to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

The Supreme Court of Nebraska in affirming an obscenity conviction which had been vacated and remanded by this Court, reprinted the *Miller* standards of obscenity but did not construe the Nebraska statute (which is similar to but broader than the Illinois statute) to include the examples or any other *Miller* requirement. *State* v. *Little Art Corporation,* 215 N.W. 2d 853, 855-56 (Neb. Sup. Ct. 1974). The Court simply held that its statutes sufficiently defined obscenity for finders of fact,[5] that their meaning and purport were clear and that they already fully complied with *Miller.*

In *Price* v. *Commonwealth,* 201 S.E. 2d 798 (Sup. Ct. of Virginia 1974), on remand of an obscenity conviction from this Court, a definition of "obscene" identical to that used in Ill. Rev. Stat., Ch. 38, §11-20(b) was held in light of two earlier Virginia Supreme Court decisions to prohibit "only hard core pornography *such as the examples delineated in Miller* and [found] not [to] restrict constitutionally protected speech and writing. We do not believe that the *Miller* examples were intended to preempt or standardize state obscenity statutes . . ." 201 S.E. 2d at 800. (Emphasis added.) This is the only reference in the Opinion to the *Miller* examples with their application to Virginia law.

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5 Section 28-926.07, R.R.S. 1943 provides that:

". . . the standard for judging obscenity to be applied as a guide by finders of fact in considering the evidence is whether to the average person the dominant theme of said material or conduct which is at issue in such civil action or criminal proceedings, taken as a whole, appeals to the prurient interest, which is to excite lustful thoughts, or a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary limits of candor."

The above citations indicate that there are different valid ways to construe state statutes into conformity with *Miller* and that an opinion does not have to literally insert *Miller* type examples into the statute to accomplish the goal. As this Court has already ruled, a state's obscenity law does *not* have to contain an encyclopedic listing of all prohibited conduct or portrayals, as in the new Louisiana statute (Appellant's Br. 25), to be constitutional. *Miller,* 413 U.S. at note 6; *Miller* v. *California II,* 418 U.S. 915 (1974); *Watkins* v. *South Carolina,* 418 U.S. 911 (1974) (last 2, appeals dismissed).

The way in which the Supreme Court of Illinois reprinted the crucial portions of *Miller* with the examples and then construed Ch. 38, §11-20 "to incorporate parts (a) and (b) of the *Miller* standards" (*People* v. *Ridens II,* 59 Ill. 2d at 371) is as clear a saving construction as the one in *Hamling* v. *United States,* 418 U.S. at 115, and is more clear than the construction expressed in the *Gower* and *Field* decisions above. Additionally, the Illinois obscenity statute was more specific to begin with than these other state and federal laws, since it defined prurient interest as "a shameful or morbid interest in nudity, sex or excretion." Of course, the Illinois Supreme Court's Opinion in the *present* case does not go deeply into construction of the Illinois obscenity definition because that question was already resolved by the Court in lengthy opinions in 1974 and 1975. Justice Crebs was correct in saying that there was no need to reconsider the *Ridens II* decision. *Ward,* 349 N.E. 2d at 49.

Therefore, the method of incorporation of *Miller's* requirements employed by the Illinois Court was effective and proper, and it precludes a successful attack on Ill. Rev. Stat., Ch. 38, §11-20(b).

III.

SUBSTANTIVE DECISIONS OF ILLINOIS REVIEWING COURTS HAVE LIMITED THE SCOPE OF THE OBSCENITY STATUTE'S PROHIBITION TO HARD CORE PORNOGRAPHY FOUND TO BE OUTSIDE THE FIRST AMENDMENT'S PROTECTION IN MILLER.

If a state court has not adopted the *Miller* examples of prohibitable conduct as a limitation on its obscenity law and if its legislature has not built some specificity into the statute, it is still possible for the statute to satisfy *Miller* requirements through limitations gradually placed on it during past interpretive decisions by the state's reviewing courts. *Miller* v. *California,* 413 U.S. at note 6; *Paris Adult Theater* v. *Slaton,* 413 U.S. 49 (1973); *Miller* v. *California* II, 418 U.S. 915 (1974). Appellant concedes this in his Brief at 16.

Several states with a history of limiting obscenity decisions from their high courts have ruled that the sum total of these decisions is a *Miller*-type requirement in state law that only patently offensive hard-core pornography is prohibitable. Appellant has noted these decisions in his Brief along with the opinions that construed *Miller* into their statutes at 17 and 18. The State of Illinois submits that its reviewing courts have a history of limiting obscenity decisions as sufficient to satisfy *Miller's* standard in Part (b) as are the decisions of those states whose courts announced they were following this path after *Miller.*

A. The Illinois Precedents.

The Illinois courts of review gave notice through their pre-*Miller* decisions that certain specific kinds of conduct or materials were within the definition of obscenity in Ill. Rev. Stat., Ch. 38, §11-20. In *People* v. *Sikora,* 32 Ill. 2d

260, 204 N.E. 2d 768, 772-73 (1965), Mr. Justice Schaefer, writing for an unanimous Supreme Court, held that three books mentioned in the indictment there were obscene under the same statutory definition of obscenity as applied in the present case. He specifically described the obscenity found in the three books as including "mutual masturbation", "self-fondling", "a circle of persons engaged in oral genital contact", "rape", flagellation with barbed wire", "lesbian foreplay", "sadism and masochism", and murder of a man by his sexual partner during intercourse. The Court concluded:

> "The sole appeal of these books is to the prurient interest, and the stimulation of that interest is clearly the author's intention. The aberrational conduct portrayed can appeal only to a shameful and morbid interest in nudity and sex. The kind of scenes that are described and the detail of description go beyond the customary limits of candor in this country. . . ." 204 N.E. 2d at 773.

This holding applying the exact language of the Illinois obscenity definition to descriptions of specific conduct was a limiting construction and gave public notice that at least these kinds of conduct could not be described or depicted in a book for sale, without violating the law. In the later decision of *City of Blue Island* v. *DeVilbiss,* 41 Ill. 2d 135, 242 N.E. 2d 761 (1969), the Supreme Court of Illinois held that four books underlying a misdemeanor conviction were obscene within the definition of a Blue Island ordinance, *which the Court noted was identical to the obscenity definition in the State Statute,* Ch. 38, §11-20. 242 N.E. 2d at 762. The Opinion specifically refers to the lurid descriptions in the books which render them obscene, including homosexual acts and assaults, rape, castration, masturbation, flagella-

tion, oral-genital acts and general sadism and masochism. 242 N.E. 2d at 764-65.

In another case where several convictions were obtained under Chicago's municipal Ordinance forbidding the sale of obscene materials, the Illinois Supreme Court took the logical step of applying its holdings on obscene descriptions in books to photo magazines which depicted conduct only described in the books. *City of Chicago* v. *Geraci,* 46 Ill. 2d 576, 264 N.E. 2d 153 (1970). The Court, speaking through Justice Schaefer, indicated its belief that a "sado-masochistic magazine which contains photographs portraying lesbianism, rape, whippings, beatings, bondage, axing and other abnormal sexual conduct" *was hard-core pornography.* At the same time, the Court held several magazines devoted to photographs of nude men and women not obscene. The definition of obscenity in the Chicago ordinance, a broader one than contained in the State Statute, did not contribute to or alter the Court's rulings. The Justices approached the convictions from the viewpoint of whether or not the magazines were protected by the First Amendment according to the standards set up by this Court, an inquiry that would be the same under either the Illinois Obscenity Statute or the Chicago Obscenity Ordinance. In concluding his *Geraci* Opinion, Justice Schaefer quoted extensively from the holding in *People* v. *Sikora, supra,* a case based upon the State statute. 264 N.E. 2d at 158.

Several other pre-1972 Illinois reviewing court decisions clarified what kinds of materials could *not* be found obscene under Ch. 38, §11-20 or any law, local or otherwise. In *People* v. *Romaine,* 38 Ill. 2d 325, 231 N.E. 2d 413 (1967) a conviction for selling the book "Fannie Hill" was reversed because it was found to have literary value, while in *People*

v. *Bruce,* 31 Ill. 2d 459, 202 N.E. 2d 497 (1964) a conviction for giving an obscene night club performance was reversed because, although it contained continual references to sexual intercourse, sex organs, and deviate sexual behavior, it included discussion of several socially important topics. The Illinois Appellate Court affirmed the dismissal of indictments charging violations of the State Obscenity Statute in selling nudist magazines in *People* v. *Biocic,* 80 Ill. App. 2d 65, 224 N.E. 2d 572 (1967). The court held that the photographs in question were not lewd and did not appeal to prurient interest.

Since 1972, several decisions have confirmed the above limitations on the Illinois Obscenity Statute, applying it only to materials which contain obscene matter as it was defined by this Court in *Miller*: depiction or description of sexual conduct in a patently offensive way. 413 U.S. at 25. In the Illinois Supreme Court's review of *People* v. *Ridens* I, 51 Ill. 2d 410, 282 N.E. 2d 691 (1972), the pictures found obscene portrayed nude males and females *engaged* in seductive embraces, posed with their legs spread so as to focus attention on their genitals. In many instances, the models had their hands or mouths close to another's genitals, suggestive of abnormal sexual conduct. The magazines in *People* v. *Gould,* 60 Ill. 2d 159, 324 N.E. 2d 412 (1975), depicted offensive sexual *conduct,* including lewd exhibitions of the genitals.

The Illinois Appellate Court affirmed obscenity convictions for sale of two magazines entitled "Bottom" and "Adult Words and Pictures" in *People* v. *Penney,* 287 N.E. 2d 220, 225 (Ill. App. Ct. 1st Dist. 1972). Stories in the magazines described rape, cunnilingus, intercourse, fellatio and lesbian acts in detail; pictures showed lewd exhibition of

the model's genitals, fondling and oral-genital contact. The court concluded:

> "Based upon our statutory definition of obscenity as implemented by the constitutional criteria, both of which we have previously set out, it is our conviction that the magazines described herein are obscene and without constitutional protection. We think their sole appeal is to the prurient interests. We think they are without any artistic or literary merit and totally devoid of any redeeming social value." 287 N.E. 2d at 225.

Casting light on how the Obscenity Statute should be applied in borderline cases, the Illinois Appellate Court, just prior to the issuance of this Court's Miller decision, held that a motion picture entitled "The Curse of Her Flesh" was not obscene. *People* v. *Burkhardt,* 297 N.E. 2d 694, 698 (Ill. App. Ct. 1st Dist. 1973). The trial court had ruled the movie obscene even though it found the picture not to be hard core pornography. Noting that the State's power to proscribe obscenity had to be narrowly construed in line "with Roth and its progeny" and was "constitutionally limited to hard-core pornography", *the Appellate Court ruled that the movie could not be obscene under Illinois law if it was not hard core pornography,* which it was not. 297 N.E. 2d at 698.

Thus, the Illinois construction of what is considered obscene under Ill. Rev. Stat., Ch. 38, §11-20 easily can be obtained from those Illinois Supreme Court and Appellate Court decisions cited above, which hold certain specific conduct or materials to be in violation of the statute. It was not necessary that the Opinions announce in so many words that they were construing the statute. It is apparent from the reasoning and results that they were doing so and that they have limited the Illinois Obscenity Statute's prohibition to

patently offensive materials falling into the category of hard core pornography.

B. Comparison With Other State Interpretations.

Based upon similar or less extensive historical interpretation of their obscenity statutes, several state high courts have held their laws to be in conformity with *Miller's* specificity requirement. Dealing with an obscenity definition almost identical to the one adopted by Illinois and challenged here, the Supreme Court of Virginia held that two of its earlier decisions had "narrowed this definition [of obscenity] by judicial construction" to include only "hard core pornography". *Price* v. *Commonwealth,* 201 S.E. 2d 798, 800 (Va. Sup. Ct., 1974), cert. denied, 419 U.S. 902 (1975). Five Texas obscenity opinions were found to have authoritatively construed a statute of the Model Penal Code, Illinois variety, so as to meet the *Miller* requirements in *West* v. *State,* 514 S.W. 2d 443, 445 (Tex. Ct. of Crim. Appeals, on Rehearing, 1974).[6] The New York Court of Appeals on remand from this court, found its obscenity statute to have already been properly limited to prohibition of hard core pornography in *People* v. *Heller,* 307 N.E. 2d 805, 813 (N.Y. Ct. of Appeals, Dec., 1973). The court cited six interpretive prior decisions and said no dictionary reference was necessary to understand the words "nudity", "sex", "excretion", "sadism" or "masochism" which "can be considered *malum in se* in terms of *commercial exploitation*". "The fact of an occasional close case serves as no basis for a declaration that the penal statute under which it is decided, is invalid." (citation omitted). 307 N.E. 2d at 813. The New

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[6] As have some other states, Texas' court then also construed the *Miller* examples into its statute.

York court went on to hold that its statute was easily interpreted as pertaining to hard core pornography and that the average man knows it when he sees it.

The California decision quoted approvingly by Wesley Ward (Appellant's Brief at 18) accomplished the same goal by holding that four previous Supreme and Appeals Court decisions had authoritatively construed its statute "so as to limit its reach to specifically defined sexual conduct". *People* v. *Enskat,* 33 Cal. App. 3d 900, 109 Cal. Rptr. 433, 438-39 (1973), cert. denied, 418 U.S. 937 (1975). These opinions relied upon for the California limiting interpretation are no more specific and informative about what the California obscenity statute prohibits than are the ten Illinois decisions from which can be obtained the needed interpretation of the almost-identical Illinois statute.

Also following *Miller,* Florida held that its broader obscenity statute as previously construed was sufficient to meet the *Miller* requirements of specificity to the person of ordinary understanding.

> "By clear and continuing judicial declarations we have for many years past "authoritatively construed" the statutory language of "lewd and lascivious." *We have said in plain, understandable language that these statutory words proscribe "an unlawful indulgence in lust; eager for sexual indulgence; open and public indecency" offensive to others.* Chesebrough v. State, 255 So.2d 675 (Fla. 1971), cert. den. 406 U.S. 976, 92 S.Ct. 2427, 32 L.Ed.2d 676, catalogues the earlier cases, although it was not decided until December 8, 1971, subsequent to the offense here.
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> Former 'authoritative construction' of the statute, announced in prior court decisions, which were of public notice at the time of the offense here, apply and were

> chargeable to appellant at the time of his offense. The record supports the convictions under these prior applicable judicial interpretations.
>
> The courts have made as clear as reasonably necessary, the test of obscenity, if it is applied with common sense in accordance with facts. There will always be those who contend otherwise, whose only object is to continue their assertion of confusion and ambiguity and who are not really looking for a reasonable test or determination of obscenity but only wish to obscure the issue, to continue a state of confusion in which they may profit or pointlessly project their perfidious pursuit of perplexity." (Emphasis added; footnote omitted.) *Rhodes* v. *State,* 283 So.2d 351, 356 (Fla. Sup. Ct. 1973)

It should be noted that none of the above sets of interpretive state court decisions furnished an exhaustive list of every kind of physical conduct or depiction that might be considered obscene under their now limited obscenity statutes. Some of the interpretive sets provide must less detail than do Illinois' ten in-depth decisions, and yet they meet appellant's approval. The *Enskat* case was denied *certiorari* in 418 U.S. 937 (1975), although four Justices would have taken it and reversed, as was the *Price* case in 419 U.S. 902 (1975). See also *Slaton* v. *Paris Adult Theater* I, 201 S.E.2d 456, 459 (Ga. Sup. Ct. 1973), *cert. denied,* 418 U.S. 939 (1974).

The fact that the Illinois Supreme Court failed to accept the Attorney General's suggestion in *Ridens II* to interpret Ill. Rev. Stat., ch. 38, §11-20 as having been limited to hard core pornography in prior Illinois decisions, does not mean that such a construction was not possible. The court in *Ridens* II sought to incorporate the entire *Miller* standards and examples, Parts (a) and (b), into the Illinois law (see argument at Point II, *supra*). They obviously felt that an exposition of Illinois' prior limiting decisions was not neces-

sary on top of the specific incorporation of *Miller* requirements.

Since there exists sufficient judicial limitation on the scope of ch. 38, §11-20, it warrants constitutional approval as it is applied in Illinois, regardless of whether or not all the limiting precedents have been gathered together in one Supreme Court opinion as have the precedents of the states cited above.[7]

IV.

ILLINOIS LAW GAVE ADEQUATE NOTICE TO WESLEY WARD THAT THE MAGAZINES HE SOLD IN 1971 WERE OBSCENE; AFFIRMANCE OF HIS CONVICTION UNDER CH. 38, §11-20, AS NOW CONSTRUED, DOES NOT OFFEND DUE PROCESS.

Ill. Rev. Stat. (1971), ch. 38, §11-20(a)(1), (b) and (c), under which Wesley Ward was convicted for selling two obscene publications, contains much specificity in its definitions of the obscene and interpretations of evidence. Subsection (b) requires that materials be made to appeal to prurient interest and go beyond customary limits of candor in description or representation before they can be labeled obscene in the eyes of the law. Prurient interest is further defined as a shameful or morbid interest in nudity, sex or excretion. Subsection (c) sets up the ordinary adult as the reference point for determining obscenity and allows the court to consider the literary, etc., merits of the materials

[7] Of course, the decisions of other states not to rely on their prior opinions or the *Miller* examples to construe their obscenity statutes do not reflect adversely on the position taken by the above state courts and the State of Illinois. Some courts never applied an obscenity law in limiting fashion and others prefer to leave all reconstruction to their legislatures. This is simply a matter of state law and preference, which this Court indicated it was willing to respect in *Miller* and *Slaton*.

as well as the degree of their acceptance by the public in this State. Only commercial exploitation of obscene matter is made punishable. Many of the statute's phrases are similar to the wording of the *Miller* standards.

When this Obscenity Statute is read against the backdrop of Illinois reviewing court interpretations and applications, as it must be, its direction and scope are clear now, just as they were in 1971. Regardless of which constitutional standards have been employed to limit the statute, Illinois courts have consistently held that lewd, sado-masochistic portrayals of sex designed to arouse prurient interest were obscene. *People* v. *Sikora,* 204 N.E. 2d 768, 773 (Ill. Sup. Ct. 1965); *City of Blue Island* v. *DeVilbiss,* 242 N.E. 2d 761, 764 (Ill. Sup. Ct. 1969); *City of Chicago* v. *Geraci,* 264 N.E. 2d 153, 158 (Ill. Sup. Ct. 1970), quoted in Argument, Part III, *supra.*[8] The Statute and these cases put Illinois book sellers on notice in 1971 that sale of lewd, sado-masochistic magazines was forbidden. Of course lewd exhibition of the genitals in any context is obscene under the Illinois decisions and *Miller* v. *California's* examples, 413 U.S. at 23-25.

[8] Among those jurisdictions that forbid the sale of obscene publications, there appears to be a national consensus that lewd, sado-masochistic portrayals of sex are obscene and prohibitable under the First Amendment. See: New York statute cited in *People* v. *Heller,* 307 N.E. 2d at 811, note 3; Louisiana Stats., Ch. 1, §14:106 reprinted in Appellant's Brief at 25; Oregon Laws 1971, ch. 743, Art. 29, §§255-262 (Codified as ch. 743, §167.060 et seq.) cited with approval in this Court's *Miller* decision at p. 24, note 6; 9 Maine Rev. Stat. Annotated (1976 Supp.), Title 17, ch. 93, §2901; Rev. Code of Wash. Annotated (1975), ch. 9.68, §.050; Code of Iowa (1975), ch. 725 as re-amended by Senate File 85, §2804 passed May 28, 1976, and signed June 28, 1976 (reprohibiting the sale of certain obscene materials, including those involving sado-masochistic abuse).

As described in the State's Motion to Dismiss or Affirm filed herein, the publications underlying Wesley Ward's conviction contain the following:

> " 'Illustrated Case Histories, A Study of Sado-Masochism,' consists of black and white and color photographs portraying nude males and females engaged in seductive embraces, posed so as to focus attention on their genitals. Sexual activity is suggested and imminent in most of the photographs. The models have their hands and mouths close to, or touching each other's genitals, suggesting abnormal sexual activity. Chains, ropes, whips, cigarettes, scissors, etc., are portrayed in the photographs in connection with such sexual activities. Captions are included with many of the pictures extolling the virtues of sex accompanied by physical torture.
>
> 'Bizarre Word, Number One,' consists of black and white and color photographs of partially clothed and naked males and females. Some of the pictures suggest that sexual activity is imminent. (See 'Bizarre World, Number One' at pp. 34, 70). Many of the photographs focus on the genitals of the models, and in some, whips are shown against the male genitals. Using whips, ropes, high heeled shoes, nets, male and female models, captions and articles, the magazine attempts to advance the cause of sex accompanied by torture." State's Motion to Dismiss Or Affirm, p. 8.

The State of Illinois submits that these publications are and always have been considered hard-core pornography under Ill. Rev. Stat., ch. 38, §11-20, as construed. Regardless of whether the constitutional standards of *Roth* v. *United States, Memoirs* v. *Massachusetts,* or *Miller* v. *California* are applied, the above described magazines are obscenity unprotected by the First Amendment.

The present criminal conviction based upon sale of materials deemed hard core pornography under *Miller and*

older standards is not effected by a re-construction of ch. 38, §11-20 from the Illinois Supreme Court, pursuant to *Miller,* Parts (a) and (b). See: *United States* v. *Hamling,* 418 U.S. 87, 100-102 (1974); *J-R Distributors, Inc.* v. *Washington,* 418 U.S. 949, 952 (Opinion of Mr. Justice White, July 25, 1974, on denial of certiorari); *United States* v. *Dachsteiner,* 518 F. 2d 20, 23 (9th Cir. 1975), cert. denied, 95 S.Ct. 1688; *United States* v. *New Orleans Book Mart,* 490 F. 2d 73, 75 (5th Cir. 1974), cert. dismissed 419 U.S. 801 (1975); *United States* v. *Alexander,* 498 F. 2d 934, 936 (2nd Cir. 1974); *Pierce* v. *State,* 296 So. 2d 218, 222 (Sup. Ct. of Alabama 1974), cert. denied, 419 U.S. 1130 (1975);[9] *West* v. *State,* 514 S.W. 2d 433, 445 (Tex. Ct. of Crim. Appeals, 1974).

This Court's Due Process Clause decisions do not prevent application of a state statute's obscenity definition, as authoritatively construed to include the specific examples of prohibited conduct listed in *Miller* v. *California,* 413 U.S. 15 (1973), to a sale of materials that occurred before *Miller. Hamling* v. *United States,* 418 U.S. 87, 115-116 (1974). As this Court recently stated in explaining the *Hamling* decision and distinguishing it from *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964), the *Miller* standard's part (b) (obscenity definition) did *not* expand the reach of the more broadly worded obscenity statutes to

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[9] Faced with a much broader obscenity statute and a dearth of appellate decisions which might construe and narrow it to specific conduct, the Supreme Court of Alabama nevertheless found that all persons had been put on notice, at least that magazines which contained lewd photographs or descriptions of female genitals were subject to the obscenity statute, since these materials had been declared obscene using federal standards and applying the state statute in an earlier Alabama decision. *Pierce* v. *State,* 296 So. 2d 218, 222 (1974).

which it was to be applied; the same, of course, cannot be said of part (c) of the *Miller* test which is not involved in the present appeal. *Marks et al.* v. *United States,* ..... U.S. ....., 45 L.W. 4233, 4235, note 10 (Mar. 1, 1977). The *Miller* enumeration of categories of material which might be found obscene did not purport to criminalize conduct which had not previously been thought criminal under the Illinois obscenity definition, Ill. Rev. Stat., ch. 38, §11-20. See *Marks* v. *United States, supra,* at 4235, note 10.

The state court decisions that appellant cites for the point that a limiting construction placed on an obscenity statute pursuant to *Miller* can be constitutionally applied only prospectively are wrongly decided, as shown in the *Hamling* and *Marks* rulings. Some state decisions that their obscenity laws must be declared unconstitutional are founded also on the false premise that the specificity requirements of *Miller,* Parts (a) and (b) may not be retroactively applied.

In the present case, Wesley Ward had notice in 1971 that the Illinois Obscenity Statute forbade the sale of magazines depicting men or women being tortured while their private organs were lewdly displayed, to excite the prurient interest of readers. Under the Illinois decisions cited in Argument, Part III, *supra,* as later under *Miller,* there was notice to magazine sellers that "hard-core pornography" was not to be sold to the public without incurring criminal liability. The question of whether Wesley Ward had specific notice as to the outer limits of criminality in the area of "soft-core pornography" is not relevant to this appeal, since the materials he was convicted of selling were clearly prohibited under any reasonable application of the Illlinois obscenity statute, no matter how broadly or narrowly it is construed. Thus, specific application of Parts (a) and (b) of *Miller* to his case would not have benefited Wesley Ward or brought about a different result in his prosecution.

CONCLUSION

In the above citations and argument, the State of Illinois has demonstrated that Ill. Rev. Stat., ch. 38, §11-20(b) had been construed before 1972 by Illinois reviewing courts as prohibiting specific types of hard core pictorial pornography, not merely nudity. Nevertheless, the Supreme Court of Illinois sought to ensure conformity to the principles of this Court's *Miller* decision by incorporating its standards (a) and (b), with specific examples, into Illinois obscenity law. The magazines Wesley Ward was convicted of selling are correctly found to be obscene under both the older Illinois limiting constructions and the new *Miller* inspired construction of the statute. Consequently, Wesley Ward has suffered no constitutional deprivation from his conviction under Ill. Rev. Stat. (1971), ch. 38, §11-20. The decision of the Supreme Court of Illinois upholding his conviction should be affirmed.

Respectfully submitted,

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